IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-352

JOHN D. PLESONS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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Cases Cited

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John D. Plesons, Petitioner, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on August 8, 1977.

OPINION BELOW

The opinion of the Court of Appeals (appendix, infra) has not been reported as yet.

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1977 (appendix, infra). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether it is in violation of the Fifth Amendment privilege 1) to fail to warn a Grand Jury witness of his constitutional rights to refuse to answer questions on the ground of self-incrimination; 2) to subsequently subpoena his records based on the information which he was called on to give for the purpose of finding an indictment against him.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself."

STATEMENT

The defendant, Dr. John D. Plesons, was charged in a twenty-count indictment with distribution of controlled substances and conspiracy. The indictment charged that Dr. Plesons did knowingly and willfully combine, conspire, confederate and agree together and with each other and with unindicted co-conspirators, Lawrence Alfred Smith and Peggy Lee Linze, and with other persons whose names are to the Grand Jury known and unknown, to distribute Dilaudid, Preludin, and

Desozyn, Schedule II narcotic Controlled Substances. On January 14, 1977, Dr. Plesons was found guilty of nineteen of the twenty charges. On February 4, 1977 the defendant was committed to the custody of the Attorney General pursuant to the provisions of Section 4205 (C) for a study and observation.

The evidence adduced at the trial may be briefly summarized as follows:

On the 26th day of August, 1976, an undercover narcotics agent purchased 200 Delaudid pills from Peggy Linze (T.77-79). Thereafter Peggy Linze and a Larry Smith were followed at various times to the Del Crest Pharmacy (T.80). On the 9th of September, 1976, Linze and Smith were arrested for the unlawful distribution of narcotics. From Smith's car were seized some blank perscription forms with Dr. Pleson's name at the top (T.100-101). From the Del Crest Pharmacy were seized the pharmacy's order forms for controlled substances and the pharmacy's inventory dated January 1, 1976 (T.159-160). A review of the prescriptions revealed that a large percentage of the prescriptions for Preludin and Dilaudid were on the Petitioner's prescription forms (T.168).

A handwriting expert testified that there was at least one prescription for each of the nineteen dates alleged in the indictment and were, at least in part, in defendant's handwriting. (T. 330-441).

For each of these prescriptions the person named as the patient testified that he did not receive the prescription or the pills.

Medical experts testified, using the medical records turned over by the doctor, that in their opinion, considering the number of prescriptions and the amount of pills prescribed, that the prescriptions were not issued in the course of a legitimate medical purpose.

Peggy Linze testified that she often received prescriptions from the defendant in return for bringing "girls" to the doctor. These prescriptions were often in other people's names and she would sell the pills that she obtained by filling the prescriptions at the Del Crest Pharmacy. (T.682-691).

Several of the "girls" testified that they did go to the defendant and receive prescriptions and money in exchange for sexual favors.

The defendant denied that he had ever given any prescriptions to Peggy Linze for other persons or in other persons' names; that he had always examined each of the individuals who came to him; that he had given the prescriptions for legitimate medical needs; and denied that he had prostitutes come to his office.

Prior to the trial, defendant filed a motion to suppress all statements made by him before the Grand Jury and the records he had turned over to Government agents when served with a Grand Jury subpoena for their production.

The evidence adduced at the hearing showed that on the 15th day of September, 1976, the defendant was served with a Grand Jury subpoena ordering him to appear before the Grand Jury on the 16th day of September, 1976. On that day, defendant appeared and gave testimony in regard to the crimes with which he was subsequently charged. Several weeks after his testimony, on the 4th of October, 1976, defendant was served with a second Grand Jury subpoena ordering him to produce certain records. The defendant handed the records over to the Government agents who had served the subpoena.

The defendant testified that after receiving the first subpoena, he contacted a lawyer and the lawyer said he would meet him at the Grand Jury room. However, the lawyer had not yet arrived when the defendant was called to testify.

At no time was the defendant ever advised of his rights under the Fifth and Sixth Amendments, nor was he informed that he was considered as a "suspect" or "potential" or "putative" defendant for crime involving the events and circumstances about which he was testifying and producing records.

Assistant United States Attorney Richard Coughlin testified that he personally had talked to the lawyer the defendant mentioned and was informed by the lawyer that the doctor had nothing to hide. Mr. Coughlin and the lawyer had made arrangements for the defendant to appear at 10:00 before the Grand Jury instead of 9:00 as stated in the subpoena, and the lawyer assured Mr. Coughlin that the defendant could in no way be implicated in the crimes being investigated and that he would be coming down for the Grand Jury appearance.

The evidence also revealed that at the time the defendant had appeared before the Grand Jury to testify, Mr. Coughlin was aware that a number of the defendant's prescriptions were filled by people who were selling drugs to Government agents (pg. 32), and that pads of the defendant's prescriptions had been found in the car of a known dope dealer (pg. 22). The defendant introduced into evidence a report, dated September 15, 1976, of a Government agent indicating that a high percentage of the prescriptions for Dilaudid and Preludin seized from Del Crest Pharmacy were written by the defendant (pg. 13). Mr. Coughlin indicated that he was not aware of the report.

Mr. Coughlin stated that at the time he went into the Grand Jury, the defendant was not a suspect, but that approximately halfway through "I started getting my suspicions, but" . . . (pg. 30).

The medical reports which were taken from the defendant pursuant to a Grand Jury subpoena were used by the Government and introduced into evidence (pg. 776). And defendant's Grand Jury testimony was used to impeach defendant.

REASONS FOR GRANTING THE WRIT

An important question of general applicability affecting the administration of criminal justice in the Federal Courts and the Constitutional rights of individuals is presented here. It is of special importance at this time because of some recent Supreme Court decisions broaching the issue of whether the failure to warn a Grand Jury witness of his Constitutional right to refuse to answer questions on the ground of self-incrimination is a violation of such privilege.

In *United States v. Mandujano,* 435 U.S. 564 (1976), the Court seemingly felt that a Grand Jury witness need not be warned of his Constitutional privilege.

In *United States v. Wong,* 553 F.2d 576, the Court of Appeals for the 9th Circuit held that a Grand Jury witness who did not effectively understand her right under the Fifth Amendment and was a potential defendant, was entitled to have her testimony suppressed at her subsequent perjury prosecution.

The Court felt that if the Government places a Grand Jury witness it knows to be virtually in position of a defendant in a situation of either perjuring or incriminating herself, such a procedure "is unfair, unless accompanied by warning which in fact appraise the witness of the right to remain silent and which thoroughly obviate involuntary self-incrimination or perjury."

The Supreme Court in *United States v. Wong,* — U.S. —, 52 L.Ed.2d 231, 97 S.Ct. — (May 1977), reversed, holding that under no circumstances may a witness, even a potential defendant, commit perjury and then rely on an alleged violation of her Fifth Amendment rights to save him from prosecution.

Then in *United States v. Washington,* 328 A.2d 98, the District of Columbia Court of Appeals held that a Grand Jury witness who is a potential defendant cannot knowingly and intelligently waive his Fifth Amendment rights unless he is informed that he is a potential defendant and in danger of indictment.

The Supreme Court in *United States v. Washington,* — U.S. —, 52 L.Ed.2d 238, 97 S.Ct. — (May 1977), again reversed, holding that the fact that a subpoenaed Grand Jury witness is a putative defendant neither impairs nor enlarges his Constitutional rights, and hence it is unnecessary to give such a defendant this additional warning as to his potential defendant status.

Further, and what is of importance here, is that after recognizing that the witness had been given *Miranda* warnings (Miranda v. Arizona, 384 U.S. 436) the Court stated, "Since warnings were given, we are not called upon to decide whether such warnings were constitutionally required (21 Cr.L. at 3050)." The decision specifically states that "this Court has not decided that the Grand Jury setting presents coercive elements which compel witnesses to incriminate themselves. Nor have we decided whether any Fifth Amendment warnings whatever are Constitutionally required for Grand Jury witnesses; moreover we have no occasion to decide these matters today (21 Cr.L. at 3049)."

From the above, it appears that the Courts of Appeal would be inclined to mandate that these warnings be given to a Grand Jury witness, while this Court on the other hand, awaits an appropriate occasion to rule upon the issue.

In the present case, as no warnings of any sort were given prior to the defendant's Grand Jury testimony, or to his release of medical records to Government agents in response to a Grand Jury subpoena, this becomes such an appropriate case

for the Court's attention. This fact is recognized in the opinion for the Eighth Circuit: "As Dr. Plesons was given no warnings by the government, the question avoided in *United States v. Washington* is presented, and we must consider whether the failure to warn Dr. Plesons and to secure an effective waiver of his rights should result in the suppression of the documents."

Unfortunately, the opinion goes on and circumvents the issues as to Fifth Amendment rights of a Grand Jury witness, and bases its decision on the "non-custodial" theory. The opinion notes that the reasoning of *Miranda* was based in crucial part on whether the suspect "has been taken into custody or otherwise deprived of his freedom in any significant way." It observes that Dr. Plesons at the time he surrendered his records to the Government agents, in effect, was neither arrested nor detained against his will, or, in general, made the subject of any compulsion or coercion. Finding, therefore, that no element of compulsion to self-incrimination was present, it concludes that no effective warnings were required; citing *Beckwith v. United States*, 425 U.S. 341 (1976) and *Garner v. United States*, 424 U.S. 648 (1976).

These cases are clearly distinguishable. In *Garner* the Government introduced Garner's income tax returns, in one of which he had identified his occupation as "professional gambler," and in all of which he had reported substantial income from wagering. The Court recognized that Garner was indeed compelled by law to file a tax return, but held that this did not constitute compelled self-incrimination.

In *Beckwith* the starting point was the filing of his tax returns; then, after his tax returns were filed, he was interrogated in his home by a Government agent for the explicit purpose of securing information that would incriminate him. The Court held that the interrogation was not conducted in an inherently coercive setting; hence the claim of compelled self-incrimination was rejected.

Granted, there is nothing inherently coercive about *Garner's* having to file a tax return, or *Beckwith's* interview in his home about his return already filed. But, in contrast to filing a tax return, the starting point for Dr. Plesons was a Grand Jury appearance! Unlike *Garner* or *Beckwith* in their non-custodial setting where the *Miranda* warnings do not apply, Plesons was required as a potential defendant, and without effective warnings, to appear before the Grand Jury investigating the crime with which he could be charged. It is one thing to have to file an income tax return, and quite another to have to testify before a Grand Jury. It is one thing to be questioned about your characterization as a "professional gambler", and quite another to be served with a Grand Jury subpoena requiring the production of medical records in your possession as the focus of a criminal investigation, and based on information one was called upon to give as a Grand Jury witness. Without doubt this latter involves substantial compulsion!

Is the analogy about the non-compulsion nature of having to file a tax return in *Garner* sufficient to satisfy the "coercive setting" issue presented in *United States v. Washington*, supra, namely: whether "the Grand Jury setting presents coercive elements which compel witnesses to incriminate themselves?" We think not. And considerating the totality of circumstances, this case must be viewed in the "Grand Jury setting" and not the "non-custodial setting."

The question that needs to be decided is whether Dr. Plesons, without effective warnings, was in effect forced by the Government to answer all questions and thereby become the subject of governmental misconduct; and whether this misconduct so underminded the fairness of the subsequent proceedings which required that he surrender his personal records to the two Government agents that the records should be suppressed. In short, whether the Constitutional guarantee not only protects a Grand

Jury witness from being compelled to give direct evidence tending to establish his guilt, but also from having to surrender any documents, or other link in the chain of evidence, which may tend to convict him of a crime.

This case presents appropriate grounds for the granting of Certiorari for the reason that it presents questions not only of the Constitutional rights of individuals, but also the administration of criminal justice in the Federal Court. If a witness is not accorded adequate procedural protection, then, as here, the Grand Jury can be utilized as a most effective discovery tool. Such a procedure would open a very wide door for abuse and oppression. As pointed out in *Michigan v. Tucker*, 417 U.S. 433 (1974), the Fifth Amendment right at trial would be an empty one indeed if its force could be circumvented by this type of prosecutorial action at the "pre-indictment" stage.

The Grand Jury as was used in this case runs the "gross risk of allowing the prosecution to evade its own Constitutional restrictions on its powers by turning the Grand Jury into its agent." *United States v. Mandujano* (Justice Brennan concurring), quoting from the dissent of Justice Douglas in *United States v. Mora*, 410 U.S. 19, 29; 35 L.Ed.2d 99; 93 S.Ct. 774 (1973).

This Court has continuously stated that the right to subpoena does not provide additional rights to discovery. *United States v. Nixon*, 418 U.S. 683; 94 S.Ct. 3090 (1974); *Bowman Dairy Co. v. United States*, 341 U.S. 214; 71 S.Ct. 675; 95 L.Ed. 879 (1951). Nor may the prosecution use the Grand Jury for the primary purpose of strengthening its case on a pending indictment or as a substitute for discovery. *United States v. Beasley*, 550 F.2d 261 (5th Cir. 1977); *United States v. Sellaro*, 514 F.2d 114 (8th Cir. 1973).

This Court can here re-affirm that "prosecution is accusatorial, not inquisitorial, and the Fifth Amendment privilege is its essential mainstay," *Rogers v. Richmond*, 365 U.S. 534; 81 S.Ct. 735. "The Government thus is constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth."

CONCLUSION

For the reasons stated above, we respectfully submit that the petition be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 77-1132

United States of America, Appellee, v. John D. Plesons, Appellant.	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: June 14, 1977

Filed: August 8, 1977

Before LAY and ROSS, Circuit Judges, and MILLER, Judge.*

ROSS, Circuit Judge.

The appellant, a St. Louis physician, was convicted by a jury on eighteen counts of violating 21 U.S.C. § 841(a)(1) and one count of violating 21 U.S.C. § 846. Specifically, these convictions relate to the unlawful distribution, and a conspiracy to distribute, Dilaudid, Preludin, and Desoxyn, three Schedule II drugs. In general the scheme involved Dr. Plesons in writing narcotic prescriptions for nonmedical purposes for

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* JACK R. MILLER, Judge, United States Court of Customs and Patent Appeals, sitting by designation.

his coconspirators who then procured the drugs at a pharmacy. Sometimes the names of Dr. Plesons' legitimate patients were used on the prescriptions, though these patients testified at trial they received neither the prescriptions nor the pills.

Medical experts inferred, in answers to hypothetical questions, that prescriptions for narcotics which Dr. Plesons had given were not medically indicated, and were in fact excessive, for the relatively minor complaints the patients were alleged to have.

Dr. Plesons has not challenged the sufficiency of the evidence against him, but appeals his conviction on the basis of the district court's refusal to suppress at trial incriminating evidence obtained by the grand jury from him in the absence of an admonishment of his fifth and sixth amendment rights.[1] Secondly, appellant has alleged that the jury instruction should have, and did not, accurately convey to the jury that to convict they must find that Dr. Plesons prescribed drugs without a legitimate medical purpose and outside of an authorized, professional medical practice where his distribution of such drugs was lawful.

Having considered the two allegations Dr. Plesons makes in detail, we affirm the conviction.

I. *The Self-Incrimination Claim*

On September 15, 1976, the government subpoenaed Dr. Plesons to appear and testify before a grand jury on the following day. The subpoena was served by two government agents

[1] Appellant also argues that he was never *warned* that he was a "putative" or potential defendant. Whether or not he was a potential defendant, the Supreme Court has decided that a witness need not be warned of the fact that he is a potential defendant. "[P]otential defendant *warnings* add nothing of value to protection of Fifth Amendment rights." (Emphasis added.) *United States v. Washington*, 45 U.S.L.W. 4465, 4468 (U.S. May 23, 1977).

who gave Dr. Plesons a list of twenty patient names and told him to bring his records on these individuals with him the next day to the grand jury. Dr. Plesons appeared and testified at the proceedings, referring throughout his testimony to information and notations in the patient files. Dr. Plesons left with his records that day, but the records were demanded subsequently by a *second* subpoena dated October 4, 1976, which required their production for the grand jury.[2] It is apparently undisputed that at no time prior to his arrest did the government inform Dr. Plesons of his right to secure counsel or his right to refuse to incriminate himself, or that if he waived such right his voluntary testimony could be used as evidence against him.

Initially in his brief Dr. Plesons had claimed error in the failure of the trial court to suppress both incriminating grand jury testimony given without warnings and the incriminating medical records subpoenaed later. However at oral argument counsel for the appellant abandoned the claim concerning the grand jury testimony because of the limited use which had been made of it at trial. As the appellant apparently concedes limited use of the grand jury *testimony* at trial, we conclude that any error in failing to warn the appellant at that stage of the proceedings was, if error at all, a harmless one. *See United States v. Donahey*, 529 F.2d 831, 832 (5th Cir. 1976).

The primary claim of the appellant rests on the extensive use which the prosecution made of Dr. Plesons' medical records, which had been surrendered to the grand jury without an admonishment to Plesons by the government of his right to refuse to do so.

At an early date, the Supreme Court established that the fifth amendment's proscription that "[n]o person * * * shall be com-

[2] The subpoena was dated October 4, 1976, but demanded production of the records before the grand jury on October 13, 1976. Apparently Dr. Plesons gave the records to the agents on October 4.

pelled in any criminal case to be a witness against himself" applied to one who appeared as a grand jury witness and was there asked incriminating questions.

> The object [of the fifth amendment] was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, *but it is as broad as the mischief against which it seeks to guard.*

Counselman v. Hitchcock, 142 U.S. 547, 562 (1892) (emphasis added). This conclusion continues to be reaffirmed: "[I]t is well settled that the Fifth Amendment privilege extends to grand jury proceedings, *Counselman v. Hitchcock*, 142 U.S. 547 (1892) * * *." *United States v. Washington, supra*, 45 U.S.L.W. at 4467.

We conclude that the privilege against self-incrimination could have been exercised by Dr. Plesons when presented with the grand jury subpoena, had he elected to do so, if the medical records in question fell within the ambit of *documents* which the fifth amendment will protect. The Supreme Court observed at an early date that "we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms." *Boyd v. United States*, 116 U.S. 616, 633 (1886). In spite of the Supreme Court's recent observation that *Boyd*, in some aspects, has been narrowed through the years, *Fisher v. United States*, 425 U.S. 391, 407 (1976), we feel the records here do come within the historic area of protection afforded by the fifth amendment to private documents.[3] In the *Fisher* case the Court discussed, in the

[3] The records in question are folders on individual patients with the patient name typed at the top. Sheets of paper and notecards show, for example, the patient's age, his complaints, a diagnosis and progress notes; prescriptions given the patient and corresponding dates are noted as well. The subpoena also requested Dr. Plesons' appointment books and records of appointments from August 1975 to September 1976.

context of the attorney-client privilege, the theory which it felt justified the protection of documents as compelled *testimonial* communications under the fifth amendment. It is, the Court says, "[t]he 'implicit authentication' rationale [which] appears to be the prevailing justification for the Fifth Amendment's application to documentary subpoenas." *Fisher v. United States, supra*, 425 U.S. at 412 n. 12. Here, unlike the *Fisher* case where the taxpayer could not authenticate his accountant's workpapers, the doctor prepared the records and could vouch for their accuracy; his compliance with the subpoena in this case acted as an assurance that the patient records produced were the ones demanded. *Id.* at 413. *Cf. United States v. Miller*, 425 U.S. 435, 440 (1976). In *Hill v. Philpott*, 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), it was "not refuted" that the physician's seized records which included, among many other types of records, "patient folders and their contents," were "generally considered privileged from disclosure by a taxpayer under the Fifth Amendment." *Id.* at 146. In *Bellis v. United States*, 417 U.S. 85, 87-88 (1974), the Supreme Court clearly pronounced that "[t]he privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life."

Furthermore, the subpoenaed medical records were in the *possession* of Dr. Plesons and were turned over to authorities by him, a fact which avoids the issue which the Supreme Court has recently raised when private papers are out of the hands of one seeking to exercise the privilege. "In *Couch v. United States* [409 U.S. 322 (1973)] we recently ruled that the Fifth Amend-

ment rights of a taxpayer were not violated by the enforcement of a documentary summons directed to her accountant and requiring production of the taxpayer's own records in the possession of the accountant. We did so on the ground that in such a case 'the ingredient of personal compulsion against an accused is lacking.' " *Fisher v. United States, supra,* 425 U.S. at 397.

We know then of no reason why the fifth amendment's protection would not have extended to Dr. Plesons and his private medical papers had he chosen to refuse to produce them. The fact remains, however, that Dr. Plesons turned them over, that they incriminated him, and that the prosecuting attorney introduced them as evidence of the crimes for which he was convicted. At trial, the records were introduced in the government's case-in-chief. They were identified for admission into evidence by Drug Enforcement Agent Robert Jones who testified that the documents were the patient records seized by him from Dr. Plesons at his office pursuant to the October 4 subpoena. Counsel for Dr. Plesons then renewed his objection to the evidence which the court had earlier refused to suppress. The records proved to be incriminating. Statements read aloud in court from the files of patients concerning alleged health problems, for example, overweight, were contradicted when a patient took the stand and denied ever having received treatment for that problem or the Preludin diet pill prescriptions.

As Dr. Plesons was given no warnings by the government, the question avoided in *United States v. Washington, supra,* 45 U.S.L.W. at 4468, is presented, and we must consider whether the failure to warn Dr. Plesons and to secure an effective waiver of his rights should result in the suppression of the documents. We conclude in the circumstances of this case, it should not.

Much of the recent debate over warnings for grand jury witnesses centers on the dictum that if one "desires the protection

of the privilege, he must claim it * * *." *United States v. Mandujano,* 425 U.S. 564, 575 (1976), *citing United States v. Monia,* 317 U.S. 424, 427 (1943). "Absent a claim of privilege, the duty to give testimony remains absolute." *Id.* at 575. Yet it is clear in an analysis of fifth amendment problems that it is *compulsion* which is condemned and that element must be examined initially. In the absence of compulsion, a witness may volunteer incriminating testimony, if that is his choice. *United States v. Washington, supra,* 45 U.S.L.W. at 4467. It is over the assessment of what constitutes compulsion, and which policies the proscription against compelled testimony is designed to protect, that the rift is created. The fifth amendment has been viewed as the guardian of each individual to resist making any incriminating utterances not the product of his free will.

In this case we do not decide that no situation exists in which warnings would be required to protect the free exercise of constitutional rights before a grand jury; we decide only that the record here reveals no actual compulsion or coercion, and that Dr. Plesons' situation in responding to the documentary summons did not contain elements of *inherent* coercion. Furthermore, we see no denigration of the adversary system of justice by the failure to warn in this case.

Dr. Plesons has not pointed in his brief to any incidents or circumstances which would give us cause to believe his free will was overborne. *See United States v. Washington, supra,* 45 U.S.L.W. at 4467, *citing Rogers v. Richmond,* 365 U.S. 534, 544 (1961). His argument rests primarily on an analogy to *Miranda* where the Court concluded "that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains *inherently compelling* pressures which work to *undermine the individual's will to resist* and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures * * * the accused must be adequately and effectively apprised of his rights

* * *." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (emphasis added). The Court in *Miranda* turned its attention to the menacing atmosphere encountered by an in-custody defendant interrogated incommunicado at the police station: "[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compusion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations * * *." *Id.* at 461.

We are unable to find a similar inherently coercive setting in this case. Plesons was served with the documentary summons several weeks after his appearance and testimony in the grand jury room.[4] He was served in his office and there turned the records over to the drug enforcement agents. He was not taken into custody. More importantly, he had, since the beginning, been in contact with a lawyer. Immediately after the first subpoena was issued on September 15, 1976, and the request to bring records along was made, Plesons "called my friend Bob Ahrens and I talked to him about the subpoena and about the 20 records." He asked Ahrens, a lawyer, "what to do." According to Plesons, Ahrens told Plesons he'd be there at the grand jury

[4] It is disputed whether or not Plesons was a "putative defendant," that is whether the grand jury investigation had focused on him at the time he was called to testify. Mr. Coughlin, the government prosecutor, asserts he was not suspect at that time, and the trial court found that the narcotic agents' report on the pharmacy, which placed Plesons in suspicious circumstances, was not available to Coughlin before the grand jury session.

Coughlin admitted "that approximately halfway through I started getting my suspicions * * *." Therefore, it may well be true that at the time of the documentary summons several weeks later Plesons was suspect and the government was aware that it sought incriminating disclosures. This factor *alone* seems insufficient to exclude evidence subpoenaed without a prior warning and waiver where the circumstances otherwise showed no compulsion, and where counsel could have helped appellant effectively exercise the right to retain the records.

the next day but, Plesons alleges, told him no more, and did not explain to him his right to remain silent. Whether or not Ahrens did inform Plesons of the privilege is a point in dispute.

Mr. Coughlin, the prosecutor, testified at the suppression hearing that Mr. Ahrens called him after the physician had called Ahrens; that Coughlin asked counsel if there was any chance the doctor was in on this; Ahrens allegedly assured Coughlin of the doctor's noninvolvement. At some point, Coughlin testified, Ahrens told him he'd told the physician "if you have got nothing to hide go ahead and testify." Plesons testified that his lawyer did come to the September 16, 1976, proceedings as promised, but did not arrive until Plesons was leaving the grand jury room. Ahrens then met Plesons as he left the grand jury room, and accompanied him while Plesons gave handwriting exemplars. Plesons was not in custody and the records were not subpoenaed until several weeks later.

We do not resolve the conflict in the evidence as to whether or not Plesons was in fact informed of his rights by *his* attorney prior to his testimony or the surrender of his records; it is not necessary to do so. We consider the setting here far removed from the circumstances of custodial interrogation which inspired the Court in *Miranda* to institute warnings as safeguards to the exercise of constitutional rights. *See also Beckwith v. United States*, 425 U.S. 341 (1976); *Garner v. United States*, 424 U.S. 648 (1976).

We thus find no inherent pressure in Dr. Plesons' situation to involuntarily incriminate himself, and no requirement of a knowing and voluntary waiver of the privilege in his situation. Though warnings would be a preferable practice, we decline to hold that fifth amendment policies were sacrificed by the admission of the documentary evidence here;[5] a future case in the grand jury setting may require a different result.

[5] We likewise reject appellant's due process claim which is based on the appeals court decision in *United States v. Wong*, No. 74-1636

II. *Jury Instruction Claim*

Appellant secondly claims prejudicial error in the refusal of the trial court to specifically instruct, as an added element of the offense, that the jury must find that the prescriptions were not written in the normal course of professional practice and that they served no legitimate medical use or purpose under the circumstances. Counsel for the appellant made this objection specifically as to Counts II through XX, the substantive counts charged; he did not object on *this* basis to the conspiracy count. Due to our disposition of this claim on other grounds, we will not discuss the government's allegation that the error was not properly preserved.

In *United States v. Moore*, 423 U.S. 122 (1975), the Supreme Court decided that medical practitioners were subject to prosecutions under 21 U.S.C. § 841(a)(1) of the Controlled Sub-

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(unpublished) (9th Cir., filed Sept. 23, 1974), *rev'd*, 45 U.S.L.W. 4464 (U.S. May 23, 1977). In that case the appellee was subpoenaed to testify before the grand jury; she was a target of the grand jury and was likely to be indicted. She was warned of her right against self-incrimination, but she nevertheless gave *false* answers to the incriminating questions. She was prosecuted for perjury.

However, both the trial court and appeals court suppressed the testimony after finding that due to her limited understanding of the English language she had not understood the self-incrimination warning. That holding rested on the fifth amendment *due processes* clause. The appeals court said: "perjurious answers were induced by an unfair procedure * * *. That unfairness stems from the threat the procedure poses to the values protected by the privilege." *United States v. Wong, supra,* No. 74-1636, slip. op. at 2. The Supreme Court reversed, holding that even in the absence of warnings, *perjury* is not justified and a grand jury witness who lies may be prosecuted. The Supreme Court analyzed the appeals court *due process* holding: "the core of respondent's due process argument, and of the Court of Appeals' holding, in reality relates to the protection of values served by the Fifth Amendment privilege * * *." *United States v. Wong, supra,* 45 U.S.L.W. at 4465.

We agree that in this situation the due process and self-incrimination claims are basically the same. We have already decided that fifth amendment values were not endangered by the disclosures, without warnings, made pursuant to the documentary summons in this case.

stances Act, and reversed the court of appeals' holding that the physician was exempt from prosecution due to his status as a "registrant" under the Act. *Id.* at 131. The Court observed that "[u]nder the Harrison Act physicians who departed from the usual course of medical practice were subject to the same penalties as street pushers with no claim to legitimacy. * * * There is no indication that Congress intended to eliminate the existing limitation on the exemption given to doctors." (Footnote omitted.) *Id.* at 139.

In this particular case the trial court instructed the jury that the defendant John D. Plesons was a licensed physician and a " 'practitioner' within the meaning of Federal law, and entitled to prescribed [sic] controlled substances within the normal course of his medical practice." The court then read portions of a regulation promulgated pursuant to the Controlled Substances Act stating the "purpose" of the issuance of a prescription. *See 21 C.F.R.* § 1306.04(a). The court quoted as follows:

> It is further a part of Federal law that "a prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice . . . An order purporting to be a prescription, issued not in the usual course of professional treatment . . . is not a prescription within the meaning and intent (of Federal law) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances."

In addition, the court read the entire indictment to the jury. In the conspiracy count it charged that: "[i]t was a further part of said conspiracy that John D. Plesons would and did write prescriptions for Dilaudid and Preludin in the names of persons referred to him by Peggy Lee Linze and Lawrence Alfred Smith

well knowing at the time of writing said prescriptions that he had not treated those patients on the dates reflected on the prescriptions, and knowing that they would not be using the drugs so prescribed *for any legitimate medical purpose*." (Emphasis added.) This phrase, "not * * * for any legitimate medical purpose" or "legitimate purpose" was repeated throughout the *conspiracy* charge thirty-two times in describing various aspects of the conspiracy.

The substantive counts charged that "John D. Plesons, M.D., a registered physician, knowingly and intentionally, and *not in the usual course of professional practice*, did distribute and dispense a quantity of Preludin * * *." (Emphasis added.) In the context of the nineteen substantive counts charged, this phrase was repeated to the jury nineteen times. Moreover, the jury was next told that "as to each count of the indictment the burden is upon the Government to prove the *charges contained in such count* against the defendant; that burden the Government assumes in the beginning and carries throughout the trial, and the Government can meet this burden as to each count only by showing to you the guilt of the defendant *as to such count beyond a reasonable doubt*." (Emphasis added.) The jury was instructed they must believe the acts were intentionally, willfully and knowingly done by the defendant. After reading the entire charge we are convinced the jurors understood that to convict Dr. Plesons he must have exceeded the bounds of professional practice in prescribing the drugs beyond a reasonable doubt.

A preferable instruction may have stated the exception more explicitly, and affirmatively, in the sense that a registrant who *does* prescribe in the usual course of professional practice is *not* subject to the penalties of that section. *See White v. United States*, 399 F.2d 813, 817 (8th Cir. 1968). A clearer statement of the "exception" is found in *United States v. Rosenberg*,[6] 515

[6] (t)he law makes it unlawful for any person to distribute a controlled substances [sic] except a practitioner who causes the controlled substance to be *distributed in the course of professional practice*. If this doctor was causing the controlled substance to be prescribed while acting as a doctor *in the course of his professional practice, then there's no violation*. However, if he was not acting in good faith as a doctor, but simply pushing pills, as counsel has said, then he does not come within the *exception*, and the law is violated.

United States v. Rosenberg, supra, 515 F.2d at 197 (emphasis added).

Note that language from the regulation was part of the indictment in that case. The court saw no difference in the meanings of the statutory phrase "in the usual course of professional practice" and the regulations' phrase, "legitimate medical purpose". *Id.* We agree.

F.2d 190, 197 (9th Cir.), *cert. denied*, 423 U.S. 1031 (1975), and a similar explanation to a jury should be given for the sake of clarity. However, considering the instructions as a whole, we find no prejudicial error in the instruction challenged here. The instruction given in this case is distinguishable from the jury charge read in *United States v. Carroll*, 518 F.2d 187 (6th Cir. 1975), where the court read only statutory definitions such as "dispense," "distribute" and "practitioner," even after the foreman had specifically returned to ask on behalf of the jury if there were any "exceptions" of which they should be aware.

For the reasons set forth above, we affirm the conviction.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals
for the Eighth Circuit

No. 77-1132

September Term, 1976

United States,

Appellee,

vs.

John D. Plesons, M.D.,

Appellant.

Judgment

(Filed August 9, 1977)

Appeal From the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the original designated record of the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this case, be, and the same is hereby, affirmed.

August 8, 1977